No. 44970-6-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

WILLIAM J. RILEY, and ALTHEA V. RILEY, husband and wife, and the marital community composed thereof; WALTER V. THOMPSON and MARY L. THOMPSON, husband and wife, and the marital community composed thereof,
APPELLANTS,

v.

UNION BANK, N.A., successor-in-interest to the FDIC as Receiver for Frontier Bank,
RESPONDENT.

APPELLANTS' REPLY BRIEF

BUDSBERG LAW GROUP, PLLC
Brian L. Budsberg, WSBA #11225
Benjamin J. Riley, WSBA #34949
Attorneys for Appellants
1115 West Bay Drive, Suite 302
Olympia, WA 98502

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Union Bank claims in its response that the Deed of Trust it nonjudicially foreclosed is somehow unrelated to the guarantees it is seeking to enforce against William Riley, Althea Riley, Walter Thompson, and Mary Thompson ("Appellants"). Union Bank is also asserting that if this Court determines that the Deed of Trust that was nonjudicially foreclosed on and the guarantee are related, then a waiver that waives any sort of legal rights that the Appellants may have against Union Bank is enforceable, even though there is no provision in the Deed of Trust Act that allows for such a waiver.

Union Bank drafted the Promissory Note, Deed of Trust, Corporate Resolution, and Guarantees that it now seeks to enforce against Appellants. Union Bank did not seek input from the Appellants in their capacities as borrowers, grantors, or guarantors in drafting these documents and therefore the documents are related. These documents, drafted by Union Bank clearly state that the Deed of Trust signed by Red Hawk, LLC and the guarantees signed by Appellants are related and the guarantees at issue secure the Deed of Trust. Additionally, the Washington State Supreme Court has struck down the ability to waive certain portions of the Deed Trust Act because the Deed of Trust has no provisions that allow for such a waiver.

Union Bank lost its ability to pursue the guarantees of the Appellants in this matter when Union Bank elected to nonjudicially foreclose on the property that was secured by the Deed of Trust. Under the Deed of Trust Act, nonjudicial foreclosures, by operation of law, discharge obligations secured by the foreclosed deed of trust. Unsecured commercial guaranty obligations remain in place and can be pursued after a nonjudicial foreclosure. Union Bank argues that the language of the Deed of Trust is unambiguous and this somehow works in the favor of Union Bank. However, Union Bank drafted a deed of trust with specific language and express terms that state that the Deed of Trust is secured by the guarantees of the Appellants.

From the plain language of the Deed of Trust, drafted by Union Bank with no input from Appellants, the guarantees are security for the Deed of Trust and thus Appellants lost their ability to pursue guarantees after completing the nonjudicial foreclosure.

ARGUMENT

I. The Deed of Trust is Expressly Security for the Guaranty

Union Bank is attempting to confuse and mischaracterize the issue of how the word "security," as contained in the Deed Trust at issue is being argued before this Court. Appellants are arguing that the plain

meaning of the words "security" and "secure," as used in the Deed of Trust, expressly state that the Deed of Trust is given to "secure" payment on the guarantees. Appellants are not arguing and do not dispute that there is other language in the Deed of Trust which addresses that certain real property owned by Red Hawk, LLC was given as collateral and security for the loan from Union Bank.

Union Bank's argument does not address or supply any evidence where there is ambiguity or confusion as to the express terms of the Deed of Trust. Appellants are arguing that the unambiguous terms of the Deed of Trust, expressly state that the Deed of Trust is security for the Appellants' guarantees. Unambiguous contract terms must be given their plain meanings. Courchaine v. Commonwealth Land Title Insurance. Co., 174 Wn.App. 27, 43, 296 P.3d 913 (Div III. 2012); Boeing Co. v. Aetna, 113 Wn.2d 869, 881-882, 784 P.2d 507 (1990). Additionally, a court cannot modify clear and unambiguous language and must interpret it by its plan meaning. Rodenbaugh v. Grange Ins., 33 Wn.App.137, 140, 141, 652 P.2d 22 (Div. III 1982); citing, Farmers Ins. v. Miller, 87 Wash.2d 70, 73, 549 P.2d 9 (1976). The documents at issue in this appeal were drafted by Union Bank and this Court should interpret these contracts by their plain meaning.

A. Deed of Trust, by Plain Meaning, Secures Guarantees

Union Bank attempts to separate the Guarantees signed by the Appellants from the Deed of Trust signed by Red Hawk, LLC as somehow being unrelated. However, the plain language set forth by the Deed of Trust clearly sets out what, specifically, the Deed of Trust secures:

> "THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO *SECURE* (A) PAYMENT OF THE *INDEBTEDNESS* AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, *THE RELATED DOCUMENTS* AND THIS DEED OF TRUST." (CP 51 Emphasis added.)

The "DEFINITIONS" section of the Deed of Trust defines the term "indebtedness" as "all principal, interest, and other amounts, costs expenses payable under the Note or Related Documents." CP 56. The definitions section of the Deed of Trust defines the term "Related Documents" as "all guaranties…now in connection with the indebtedness". CP 56. emphasis added. The "PAYMENT AND PERFORMANCE" section of the Deed of Trust states that "Grantor shall pay to lender all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of Grantors obligations under the Note, this Deed of, and the Related Documents." CP 51.

Union Bank attempts to confuse this Court by stating that the corporate resolution signed by the members of Red Hawk, LLC shows that the Appellants somehow acknowledge that the Deed of Trust is not security for the guarantee. The corporate resolution was signed in order to allow authorization for the Red Hawk, LLC to enter into the Deed of Trust. There is no reference or acknowledgement anywhere in this corporate resolution that states that the members of Red Hawk, LLC, in their individual capacity, state that the Deed of Trust is not security for the guarantees signed by the Appellants.

Additionally, the term guaranty is repeatedly defined in the Deed of Trust:

> "The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Indebtedness…
> The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note." (CP 56).

Having the term "guaranty" and "guarantor" defined in the Deed of Trust goes against Union Bank's argument that the Deed of Trust and Guaranty are separate and apart. If the Guaranty and Deed of Trust are separate than Union Bank would not have a need to define this term in the Deed of Trust. Similarly, the Deed of Trust defines default under a guaranty as an event of default under the Deed of Trust: "The word "Default" means the

Default set forth in this Deed of Trust in the section titled "Default." (CP 56). If the Deed of Trust and Guarantees signed by the Appellants were unrelated and the Deed of Trust only secured the Grantor's obligations then there would not be a need for Union Bank to make default under the Guarantor's obligation an event of default on the Deed of Trust.

B. Plain Language of Contract Determines Intent

Union Bank claims, based on the professional background and an alleged bargained for intent of the parties at the time of the signing of the Deed of Trust and guarantees, that the Appellants understood that the guarantees they signed were separate and apart from the Deed of Trust. Union Bank takes this position even though the wording of the Deed of Trust expressly states that Deed of Trust is security for the guarantees signed by the Appellants and Union Bank drafted the Deed of Trust and accompanying documents with no input from Appellants. However, intent does not control in this matter, only the wording of the contract does. Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (1993). All of the documents signed by the Appellants, Deed of Trust, Promissory Note, Corporate Resolution, and the Individual Guarantees, were drafted on Union Bank forms. There was no input given by Appellants in the construction, wording, or drafting of these

documents. Even if there were some other intention other than the plain meaning of the wording of the Deed of Trust, which there clearly is not, the express wording of Deed of Trust expressly provides that the Deed of Trust is security for the Guarantees of the Appellants.

II. Language of Statute Clearly Prohibits Actions on Guarantees for Deficiencies After the Nonjudicial Foreclosure of the Deed of Trust Securing that Guarantee

Along the same lines, the plain meaning and express wording of the Deed of Trust Act—specifically RCW 61.24.100—precludes an action for deficiency after the foreclosure of a Deed of Trust that secured the guarantees of the Appellants. Union Bank argues that the legislative intent of RCW 61.24.100 somehow allows for the ability to seek a deficiency even though the language of the statue expressly prohibits a deficiency to be sought against guarantees that are secured by the Deed of Trust. RCW 61.24.100(1) states:

> "(1) Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust."

RCW 61.24.100(10) also prohibits seeking a deficiency after a nonjudicial foreclosure:

> (10) A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a

> borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust.

The Washington State Supreme Court has held that a foreclosing creditor has option to elect a remedy, a "quid pro quo" election, which allows for the bank to benefit from a streamlined process but must forgo other remedies such as deficiencies after non-judicial foreclosure sales. Donovick v. Seattle First-Nat. Bank, 111 Wash.2d 413, 416 (1988).

Union Bank points to the ruling in Donovick and the subsequent amendments to RCW 61.24.100 sections (3), (4), and (5) as somehow now allowing a creditor to seek a deficiency on a guarantee after a nonjudicial foreclosure of a Deed of Trust that was secured by said guarantees. This is simply not the case. RCW 61.24.100(3) sets forth the ability of a foreclosing creditor to seek a deficiency after the foreclosure sale of property and to bring an action for rents that were wrongfully withheld or damage to the property after the foreclosure occurred. RCW 61.24.100(4) sets the time period that a deficiency action must be commenced after a foreclosure. RCW 61.24.100(5) sets forth the ability of a party who is subject of a deficiency action to request a fair value hearing after the sale of the property. None of these sections conflict with or overrule RCW 61.24.100(10), which specifically states that a deficiency cannot be sought, after a nonjudicial foreclosure, against a guarantor if that guaranty

was secured by the Deed of Trust. There are no legislative notes or case law in Washington that strikes down or finds RCW 61.24.100(10) not applicable in the event that a creditor elects to nonjudicially foreclose on a Deed of Trust that is secured by a guarantee.

III. The Protections of RCW 61.24.100 Cannot be Waived

Union Bank further argues that the waiver of any and all legal rights of the Appellants must be enforced, including the waiver of any protections afforded the Appellants under the Deed of Trust Act. Union Bank does not present any argument as to why the waiver it is seeking to enforce against Appellants can be distinguished and is different in nature than the waivers that the Washington Supreme Court has repeatedly struck down. Union Bank also does not address the two recent Supreme Court decisions that focus on the Deed of Trust Act and whether a party can waive the protections afforded therein. See, Schroeder v. Excelsior Management Group, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013); Bain v. Metro Mortgage Group, 175 Wn.2d 83, 107-108, 285 P.3d 34 (2012). The court in Schroeder held that a party could not agree to non-judicially foreclose on agricultural land because the Deed of Trust Act did not allow for non-judicial foreclosure of agricultural land. Id. at 683. Similarly, the court found the Deed of Trust Act analogous to the Arbitration Act where,

when the parties avail themselves of the protection of the Act then the statutory rights under that act cannot be waived. Bain, 175 Wn.2d 108 citing Godfrey v. Hartford Ins. Cas. Co., 142 Wash.2d 885, 16 P.3d 617 (2001). The Supreme Court has stated that waivers are not favored in statutes and not allowed in the context of the Deed of Trust act, "We will not allow waiver of statutory protections lightly." Schroeder, 177 Wn.2d at 107, quoting Bain, 175 Wn. 2d at 108.

Similarly, the Supreme Court has allowed waivers of rights under a statute only when Legislature has expressly allowed for these waivers. When the Legislature specially authorizes certain specified acts, acts not so specified will be presumed to be deliberately excluded. National Electric Contractor's Ass' n v. Riverland, 138 Wn. 2d 9, 17 -18, 978 P. 2d 481 (1999); Landmark Dev., Inc. v. City of Roy, 138 Wn. 2d 561, 571,980 P. 2d 1234 (1999). Put another way, "omissions are deemed exclusions." Adams v. King County, supra, 164 Wn.2d at 650, quoting, In re Det. Of Williams, 147 Wn. 2d 476, 491, 55 P. 3d 597 (2002). Applied to the Deed of Trust Act, the legislature does not authorize any waiver of the protections contained in the statute. RCW 61.24.100 begins with mandatory language which specifically states that a deficiency judgment "shall not be obtained" against a borrower or guarantor. The only modifications that can be made to the rights of the parties under RCW

61.24.100 have nothing to do with the waiver of protections against a deficiency. Subsection (9), the Legislature authorizes parties to contractually prohibit a lender from seeking a deficiency. Similarly, subsection (4) provides that parties may, in certain express and limited circumstances, contract for a deadline to file a deficiency suit later than the Act's statute of limitations. At subsection (7), the Legislature authorizes parties to contractually preserve a deficiency against the guarantor in instances where a deed in lieu of foreclosure is accepted. Lastly, at subsection (11), the Legislature authorizes parties to waive a guarantor's objection to impairment of collateral by the trustee's sale. The narrow and limited authorizations in subsections (4), (7), (9) and (11) are the only circumstances in which the Legislature authorizes contractual limitation of Deed of Trust Act protections.

The Supreme Court has twice refused in the last two years to allow waiver of Deed of Trust Act protections. As the Court said in Bain, "We will not allow waiver of statutory protections lightly." 175 Wn.2d at 108. The mandates of the Deed of Trust Act preclude enforcement of Union Bank's waiver provisions. These statutory provisions, when applied to the Court's rulings in Bain and Schroeder that parties cannot contractually modify the Deed of Trust Act, prohibit a waiver of the anti-deficiency protections contained in the Deed of Trust Act. Schroeder, 177 Wn.2d at

106-07; Bain, 175 Wn. 2d at 107-08. The case law Union Bank asserts does not address the specific rulings of the Washington Supreme Court on the Deed of Trust Act. The Bain Court ruled that a lender could not contractually modify the requirement of the Deed of Trust Act's requirement that a beneficiary must actually hold the secured note prior to using the benefits of a nonjudicial foreclosure. Bain, 175 Wn.2d at 107-08. The Schroeder Court held the Statutory requirement that agricultural land be foreclosed judicially, rather than non-judicially, in the Deed of Trust Act could not be waived by parties to deed of trust, where Act was not a rights-or-privileges-creating statute; even though the borrower contracted that he "knowingly waives his right, pursuant to RCW 61.24.030(2) to judicial foreclosure on the subject property on the grounds it is used for agricultural purposes." Schroeder, 177 Wn.2d at 100.

Union Bank additionally argues that the quid pro quo argument for electing to pursue a nonjudicial foreclosure versus a judicial foreclosure does not apply because it can be waived. RCW 61.24.100 is straight forward in its language regarding anti deficiency clauses in the case of nonjudicial foreclosures and clearly sets forth the procedures for judicial foreclosure and redemption rights of debtors. This quid pro quo trade off is clearly placed within the statute and allows for a lender to make a decision with the benefits and pitfalls of a nonjudicial versus judicial

foreclosure. Thompson v. Smith, 58 Wn.App. 361, 365, 793 P.2d 449 (Div. 1, 1990). Allowing for parties to contractually waive portions of the Deed of Trust Act, where no waiver is statutorily allowed, upsets the public policy and intent of the statute and is not in accordance with the rulings of the Washington State Supreme Court.

CONCLUSION

The documents drafted by Union Bank in this matter are explicitly clear that the Deed of Trust at issue is secured by the Guarantees of the Appellants, thus any deficiency from a foreclosure sale was waived when Union Bank elected to conduct a Nonjudicial, as opposed to judicial, foreclosure. Additionally, because there are no statutory provisions in the Deed of Trust Act that allow parties to contractually waive their right or protections, the Court must deny enforcement of the waiver clause in the guarantees signed by Appellants.

Dated this 1st Day of November, 2013

Respectfully submitted,

BUDSBERG LAW GROUP, PLLC

By _____
Benjamin J. Riley, WSBA No. 34949
Brian L. Budsberg, WSBA No. 11225
Attorneys for Appellants Riley and Thompson

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2013 I caused to be served *via E-mail (per the Stipulated Agreement)* the foregoing Appellants' Reply Brief on the following parties at the following addresses:

Averil Budge Rothrock
Schwabe Williamson & Wyatt
1420 5th Ave Ste 3400
Seattle, WA 98101
Fax: 206-292-0460
arothrock@schwabe.com

Matthew Turetsky
Schwabe Williamson & Wyatt
1420 5th Ave Ste 3400
Seattle, WA 98101
Fax: 206-292-0460
mturetsky@schwabe.com

Claire Louise Been
Schwabe Williamson & Wyatt
1420 5th Ave Ste 3400
Seattle, WA 98101
Fax: 206-292-0460
cbeen@schwabe.com

Emily Rambo

Emily Penoyar Rambo

BUDSBERG LAW GROUP PLLC

November 01, 2013 - 12:53 PM

Transmittal Letter

Document Uploaded: 449706-Reply Brief.pdf

Case Name: Union Bank v. William J. Riley, et ux, et al.
Court of Appeals Case Number: 44970-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Emily P Rambo - Email: **paralegal@budsberg.com**

A copy of this document has been emailed to the following addresses:
paralegal@budsberg.com